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No. 91-955

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In The

Supreme Court of the United States

October Term, 1991

BARBARA PROPST,

Petitioner,

vs.

MORTON W. WEIR, JUDITH S. LIEBMAN, and ROBERT M. BERDAHL,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit

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COUNTER-STATEMENT OF THE CASE

This case arose from a difficult conflict among the top administrative personnel of the University of Illinois Computer-based Education and Research Laboratory ("CERL"). A wife and husband, Barbara and Franklin Propst, who together headed up the CERL business office, accused their immediate superior, the director of CERL, Donald Bitzer, of a conflict of interest. The University thoroughly investigated these charges over a period of several months.

Throughout this period, Chancellor Morton W. Weir, Vice-Chancellor Judith S. Liebman and Vice-Chancellor Robert M. Berdahl (collectively, the "University Administrators") received reports from subordinates that CERL was deteriorating because of growing dissension in the workplace. As the Seventh Circuit Court of Appeals found, the University Administrators "decided that either Bitzer or the Propsts had to go if the Laboratory was to return to normal. When in the fall of 1987 the auditors submitted a report that the administrators interpreted as absolving Bitzer of any material conflicts, the administrators decided to move the Propsts." (App. 31).[1]

The Court should note two highly-misleading statements in petitioner's statement of the case. First, petitioner states that she was "removed" from her CERL position, implying that she was fired. (Petition, at 4, 5). In truth, the petitioner was not fired but was simply transferred from CERL to the position of Assistant Dean in the

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[1] "App." indicates reference to the Opinion of the Court of Appeals, contained in the Appendix to Petitioner's Petition.

College of Applied Life Studies without any loss of salary or benefits. Similarly, petitioner's husband, Franklin Propst, was transferred from CERL to his tenured position in the University's physics department, also without loss of salary or benefits. (App. 31-32). At no time was the petitioner ever terminated from her employment at the University of Illinois.

Second, petitioner states that defendants' motion for summary judgment was filed "prior to any discovery". (Petition, at 5). However, petitioner's lawyers had the opportunity to examine under oath all three of the University Administrators, and defendant Donald Bitzer, in a series of lengthy depositions and to obtain production of hundreds of documents in the parallel case filed by petitioner's husband, Franklin Propst. The discovery in the parallel Franklin Propst case includes a 1034-page deposition of Bitzer, a 330-page deposition of Weir, a 420-page deposition of Liebman, a 283-page deposition of Berdahl, a 1467-page deposition of Franklin Propst, and a 860-page deposition of Barbara Propst.

As a further Counter-Statement of the Case, the University Administrators adopt and incorporate by reference the statement of facts in the Court of Appeals opinion below. In addition, the University Administrators set forth the following material facts which confronted them when they made their decision to transfer petitioner to another administrative position on the University of Illinois campus:

- Barbara and Franklin Propst, who held the two senior financial positions in CERL, were

at extreme odds with CERL's director, Donald Bitzer. SA 173-78, 184-85, 196-98.[2]

- The Propsts made serious accusations of wrongdoing against Bitzer for conflicts of interest, which prompted a full-scale University audit. SA 172-74, 194-95, 214-17, 237-39.
- The work in CERL was being seriously disrupted by their dispute. SA 109, 125-28, 139, 142, 149-50, 155-56, 222-228, 246.
- The University had to appoint a "go-between" between the Propsts and Bitzer to get any work done at CERL. SA 179-80, 199.
- Groups of CERL employees and others complained to each of Weir, Berdahl and Liebman about the adverse working atmosphere in the laboratory, the friction between the Propsts and Bitzer, and the burdens and anxiety visited on lab personnel by the University's investigation of Propsts' accusations against Bitzer. Employees had made veiled threats to quit. SA 139-40, 157-58.
- The situation was intolerable in the laboratory; either Bitzer or the Propsts had to be removed from CERL. SA 112-13, 128-29.
- If Bitzer had been guilty of wrongdoing, he would have been removed as CERL's director. SA 113, 153-154.
- The University audit found that Bitzer had engaged in no material wrongdoing. SA 110-111, 125, 189-90, 192, 200, 202.

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[2] "SA" indicates references to the Supplemental Appendix of materials from the Record on Appeal before the Court of Appeals.

- CERL's continued success was tied to Donald Bitzer. SA 113, 159, 231-32, 236.
- Franklin Propst was a tenured professor in the Physics Department. Barbara Propst could fulfill other administrative posts within the University. SA 121, 230, 233-35, 241.

Petitioner's "questions presented" numbers 2 and 3 are not applicable in this case. The University Administrators have not made any argument based on their subjective belief, and the Seventh Circuit made no ruling based on subjective belief, contrary to Question 2's premise. As stated above, the petitioner had access to substantial discovery, contrary to the premise of Question 3.

Finally, the University Administrators have indeed argued, contrary to petitioner's implications (Petition, at 7), that the clearly established law at the time in question, and still today, allows administrators, after reasonable balancing, to transfer an employee whose speech is disrupting her workplace. The University Administrators have argued that the balance they struck was not only objectively reasonable, but even correct with hindsight. For striking an objectively reasonable balance, the University Administrators are entitled to qualified immunity.

REASONS FOR DENYING THE WRIT

I. The Decision Below Is In Accordance With The Well-Established Objective Test Set Forth In Several Decisions Of This Court

In ruling that the University Administrators are entitled to qualified immunity, the Seventh Circuit decision followed the well-accepted objective test established by this Court. According to a settled and often quoted principle, public officials are entitled to the protections of qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Accord, Auriemma v. Rice*, 910 F.2d 1449, 1452 (7th Cir. 1990) (*en banc*), *cert. denied*, 111 S.Ct. 2796 (1991) (quoting *Polenz v. Parrott*, 883 F.2d 551, 553-54 (7th Cir. 1989) itself quoting *Harlow*).

In applying this test, this Court in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), cautioned that the objective reasonableness of an official's immunity – and therefore his entitlement to qualified immunity – often depends upon the information the official actually possessed. Like the petitioner here, Creighton asserted that examining the information possessed by public officials injected a subjective component into the inquiry. This Court rejected that argument in *Anderson*, stating:

> [C]ontrary to the Creightons' assertion, this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize.

483 U.S. at 641. Petitioner's argument has already been heard and rejected by this Court.

The relevant question in *Anderson* was:

> whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.

483 U.S. at 641. Likewise, in this case, the relevant question is whether reasonable university officials could have believed Barbara Propst's transfer to be lawful, in light of clearly established law and the information that the University Administrators possessed.

The "clearly established" law shedding light on this case is *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny. Thus, the relevant objective question here is whether reasonable administrators could have believed Barbara Propst's transfer to be lawful under *Pickering* and its progeny, given the specific facts confronting the University Administrators. In finding that reasonable university administrators could have believed that Barbara Propst's transfer to another responsible post at the University of Illinois was lawful, the Seventh Circuit properly applied the objective, qualified immunity test. The Seventh Circuit did not, despite petitioner's assertions, reject *Pickering* and *Rankin v. McPherson*, 483 U.S. 378 (1987). These cases did not involve qualified immunity. Whether *Pickering* and *Rankin* call for inquiry about the "actual conditions" in the workplace is inapposite here, where qualified immunity is asserted by University Administrators who were not present in the workplace.

The Seventh Circuit's decision is in line with the well-established principle articulated in United States

Supreme Court and Court of Appeals decisions that since "objectively reasonable but mistaken conclusions do not violate the Constitution" (App. 33), the correct inquiry focuses on the facts confronting public officials when they act. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987); *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991); App. 33; *Auriemma*, 910 F.2d at 1455; *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.), *cert. denied*, 488 U.S. 968 (1988). In *Malley v. Briggs*, 475 U.S. 335, 341 (1986), this Court stated: "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law". If petitioner's theory were accepted, the law of qualified immunity would change drastically and would provide little or no protection to officials who must rely on subordinates to report to them about workplace conditions.

II. The "Minimum Quantum of Proof" Standard Applied In This Case Is Consistent With The Traditional Summary Judgment Standard Set Forth By This Court

The Seventh Circuit's ruling is in accord with the well-established doctrine that a plaintiff may not rely on speculative, conclusory allegations of the complaint to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) ("[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a general issue for trial"); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary

judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). Despite having had unique access to discovery in the face of a qualified immunity defense, Barbara Propst did not meet the standard required of nonmovants to defeat a motion for summary judgment. She produced no competent evidence at all to support her allegations that the University Administrators (i) did not actually receive the information about disruptions at CERL, (ii) made an objectively unreasonable decision, or (iii) acted with an improper purpose.

Barbara Propst "offers no reason other than her own suspicions" to impute improper motive to the University Administrators. (App. 38). Barbara Propst's lawyers had the opportunity to cross examine all three University Administrators in a series of lengthy depositions and to obtain extensive document discovery in the parallel case filed by Barbara Propst's husband, Franklin Propst.[3] In Franklin Propst's case, which presented "the same legal issue – qualified immunity – in identical procedural and

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[3] The *Franklin Propst* case is still pending in the United States District Court for the Central District of Illinois. *Franklin M. Propst v. Bitzer*, No. 88-3005 (C.D. Ill.). The district judge in that case denied summary judgment, but found that the qualified immunity question was a close one and certified the question for appeal. The Seventh Circuit declined to exercise its discretion to hear the appeal, at least in part on procedural grounds. *Weir v. Franklin M. Propst*, 915 F.2d 283 (7th Cir. 1990). A renewed motive for summary judgment has now been filed in the district court based upon the Seventh Circuit's decision in the *Barbara Propst* case.

factual contexts" (*F. Propst v. Bitzer*, et al., No. 88-3005 (C.D. Ill. Nov. 25, 1991 at 2); (C.D. Ill. June 20, 1990 at 5)), discovery focused on the same facts giving rise to this case. Barbara Propst's lawyer, who also represents Franklin Propst, questioned deponents extensively about Barbara Propst's transfer and the circumstances surrounding it.

Even with access to the complete evidentiary record made in Franklin Propst's case, Barbara Propst "does not deny that the three administrators received reports of growing dissension, of diversion of time from the Lab's work, and of plans to leave unless something were done." (App. 32). Not only did Barbara Propst fail to produce any deposition testimony or a single affidavit as evidence of improper motive, she also failed to file an affidavit under Fed. R. Civ. P. 56(f) stating that she needed a "continuance to permit affidavits to be obtained or depositions to be taken." *Monks v. Marlinga*, 923 F.2d 423, 425 (6th Cir. 1991) (affirming summary judgment for defendants-appellees where plaintiffs-appellants had "failed to submit any affidavits whatsoever").

This case is not a proper vehicle to address the "heightened pleading standard" which was alluded to in *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). Justice Kennedy, in a concurring opinion in *Siegert*, presented this standard as a way to resolve, "the tension between the rationale of *Harlow* and the requirement of malice." 111 S.Ct. at 1795. The promise made in *Harlow*, that defendants entitled to qualified immunity would not be subjected to discovery, conflicts with the need to establish improper intent in certain constitutional causes of action. That perceived conflict is *not* present in this case.

Here, Barbara Propst has already had access to, and the use of, *substantial* document and deposition discovery relating to the transfer of her husband and her. She has had the opportunity to probe the University Administrators' motives in depth. Accordingly, there is no concrete circumstance in this petition for this Court to decide how to reconcile *Harlow's* promise of protection from discovery with the requirement of improper intent. The University Administrators have already been subjected to extensive discovery. In support of their motion for summary judgment in this case, the University Administrators filed 35 pages of testimony from Berdahl's deposition, 32 pages from Weir's deposition, 18 pages from Barbara Propst's deposition, 33 pages from Franklin Propst's deposition, 38 pages from Liebman's deposition, 4 pages from Bitzer's deposition, and several exhibits and discovery documents.

Judge Phillips, concurring in the Fourth Circuit's per curiam judgment in *Collinson v. Gott*, 895 F.2d 994, 1002 (4th Cir. 1990), stated that he did not believe that requiring plaintiffs to point to specific evidence of improper intent necessarily imposed a "higher than ordinary standard on plaintiffs opposing summary judgments". Judge Phillips stated that such a requirement:

> Simply provides that plaintiffs cannot rely on merely conclusory assertions of unconstitutional motive in this context. In this, it seems to me to be well within established procedures under Fed. R. Civ. P. 56, particularly in the aftermath of *Celotex* and *Liberty Lobby*. If it does represent a heightened standard, however, I agree with the *Pueblo* court that it is justified as a necessary means for vindicating immunity principles.

895 F.2d at 1002. Because one of the elements of Barbara Propst's claim is improper intent, her failure to bring forward any evidence of improper motive is a failure to "present evidence from which a jury might return a verdict in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Barbara Propst has not met the ordinary standard imposed on plaintiffs opposing summary judgment.

If a heightened pleading standard were applied in this case, Barbara Propst could not meet it. But it is not necessary in this case to establish a heightened standard. Barbara Propst failed to meet the traditional summary judgment standard after having had access to voluminous discovery materials. Although the Court may desire to clarify whether a heightened pleading standard is required, such a clarification in this case would not be appropriate.

III. Supreme Court Review Is Not Warranted

Supreme Court Rule 10 sets forth the character of reasons for granting certiorari. No such reasons are present in the instant case. Petitioner has not cited any conflict between the Court of Appeals decision in this case and the decision of any other Court of Appeals. There are no state court decisions that are applicable to the issues presented. The Seventh Circuit's decision in this case is consistent with traditional legal principles, long-settled by this Court. The potentially important federal law question raised by the *Siegert* decision does not present a live controversy in this case.

This case breaks no new ground. The Seventh Circuit properly applied the objective qualified immunity test to administrators who, though not present in the workplace, had to balance competing interests based on the facts as reported to them. Confronted with a substantial showing by the University Administrators that they acted in an objectively reasonable manner, Barbara Propst introduced no evidence to support her allegation of improper motive, even after access to substantial discovery. The Seventh Circuit properly ruled that the University Administrators were entitled to summary judgment based upon the qualified immunity defense. No Supreme Court review is required or appropriate.

CONCLUSION

For these reasons, Barbara Propst's petition should be denied.

Respectfully submitted,

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